IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

FAO (Ord.) 217 of 1999.

Judgment reserved on 1.11.2007.

Date of decision: 13.11.2007.

Balbir Singh alias Kaloo …**Appellant.**

Versus

Mohinder Singh Rathour & others …**Respondents.**

Coram

The Hon'ble Mr.Justice Dev Darshan Sud, J.

Whether approved for reporting?[1] *Yes.*

For the appellant: **Mr. Ashwani Pathak, Advocate.**

For Respondent No. 1 **Mr. Ashwani Sharma, Advocate.**

For respondent No. 4 **Mr. Aman Sood vice Mr. N.K.Sood, Advocate.**

Dev Darshan Sud, J.

The defendant has appealed against the judgment and order passed by the learned Additional District Judge, Mandi in a petition for grant of probate under Section 276 of the Indian Succession Act (hereafter referred to as 'the Act') filed by the respondents.

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[1] *Whether reports of Local Papers may be allowed to see the judgment? Yes.*

The brief facts necessary for disposal of this appeal may be noticed: The deceased Smt. Leela Devi, wife of Shri Man Bahadur executed a Will on 7.1.1993 in favour of respondent bequeathing her entire estate to the respondent- petitioner. She died on 11.1.1993. At the time of her death, she was working as Ward Servant in the Bhakhra Beas Management Board Hospital (hereafter referred to as "BBMB Hospital") at Sundernagar. It is alleged that the deceased was married to one Shri Mohinder Singh who had deserted her and later on she married Man Bahadur. The respondent – petitioner filed proceedings under Section 276 of the Act, praying for grant of probate of the last Will and Testament Ex.PW-1/A of the deceased Leela Devi.

Petition was resisted by respondents – appellants 2 and 3 on a number of grounds. Respondents 5 and 6 resisted the grant of probate of the Will on a number of grounds submitting that they were the natural heirs of deceased Smt. Leela Devi, being her son and daughter respectively and that the Will set up was shrouded by a number of suspicious circumstances. It was submitted that the Will had never been executed by the deceased and even if it is

accepted to be as such, it is the outcome of fraud, undue influence and coercion and is surrounded by suspicious circumstances. The crux of the defence of respondents 5 and 6 is contained in para 2 of the written statement filed by them in opposition to the petition instituted by the respondent (petitioner before learned trial Court) which is:

> **"2.That para No. 2 of the petition is wrong, hence denied. The alleged writing is neither the last Will nor the same can be designated as such, which was never executed by the deceased. Even if admitted, though not admitted, the alleged Will is an outcome of fraud, undue influence and coercion and is surrounded by the suspicious circumstances, as such got no value in the eyes of law. The replying respondents are the rightful legal heirs to inherit the property of deceased, therefore, the alleged writing designated as Will is highly unnatural especially in favour of the petitioner, who is a typist in Court Campus."**

It was alleged that they were the natural heirs of the deceased being her son and daughter and were entitled to inherit the estate of the deceased. In

the amended petition which was filed, defence of respondents 5 and 6 namely Balbir Singh and Raj Rani before learned trial Court was no different. It was submitted that the petition was nothing but a tissue of lies. Shri Mohinder Singh, father of the two respondents as aforesaid had not deserted the deceased; no Will had ever been executed in favour of respondent Mohinder Singh Rathour; the Will was not the last Will and Testament of the deceased and was the outcome of fraud, undue influence, coercion and surrounded by suspicious circumstances. It may be noticed that the amendment sought by the respondent herein (petitioner before learned trial Court) was that the first husband of the deceased Mohinder Singh had deserted her and she had thereafter married Man Bahadur.

The other respondents also feebly contested the grant of Probate to the respondent-petitioner.

Learned trial Court framed four issues; the crucial issues being as to whether the petitioner before the trial Court was entitled for a Probate of the Will Ex.PW-1/A and issue 3-A as to whether the Will was surrounded by suspicious circumstances and is the outcome of undue influence, fraud and

coercion. These two issues were tried together, and the learned trial Court after considering the evidence in detail decided in favour of the respondent herein and granted Probate Ex.PW-1/A in favour of the respondent petitioner.

The Court did not find anything suspicious in the Will, nor was there any evidence of undue influence, fraud etc. as alleged. The contesting respondents are in appeal before this Court.

I have heard the learned counsel for the parties and gone through the record. Learned counsel for the appellant submits that learned trial Court has misdirected itself both on the question of law and facts of the case. He submits that the Will has not been proved in accordance with law and, therefore, no Probate could have been granted. He has pointed out that the Will is shrouded by suspicious circumstances. According to learned counsel, the first circumstance is that on 7.1.1993, the deceased was on duty in the BBMB Hospital at Sundernagar and it was not possible for her to have executed the Will at Mandi which is ½ / 1 hour traveling time from her place of work. The second circumstance, according to him, is that out of the

two attesting witnesses, RW-3 Baldev, who is one of the attesting witnesses, has not supported the case set up by the petitioner before the trial Court. His testimony clearly discloses that the Will was never executed by the deceased and that he was not an attesting witness to the Will Ex.PW-1/A. The third circumstance urged by the learned counsel is that the Will has been executed on stamp paper which has been printed in the year 1991 and it was not possible to have used it in the year 1993. The fourth circumstance is that the scribe as also the attesting witnesses and the beneficiary are all based in the Court at Mandi and have influenced the mind of the deceased or fabricated the Will. He submits that all these circumstances coupled with the exclusion of the natural heirs were sufficient to have the respondent petitioner non suited. He places reliance on the decision of the Hon'ble Supreme Court in H. Venkatachala Iyengar v. B.N.Thimmajamma and others AIR 1959 SC 443 holding:

> **(18) What is the true legal position in the matter of proof of wills? It is well known that the proof of wills presents a recurring topic for decision in Courts and there are a**

large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under S. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. S. 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Ss. 59 and 63 of the Indian Succession Act are also

relevant. S. 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. S. 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved

like any other document except as to the special requirements of attestation prescribe by S. 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

(20) There may, however, be cases in which the execution of the will may be surrounded by suspicions circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said

dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

(21) Apart from the suspicious circumstances to which we have just referred in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the

wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English Courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical Courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word 'conscience' in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the Court is the last will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly

executed by the testator who is no longer alive.

(22) It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in Harmes v. Hinkson, 50 Cal W N 895 : (A I R 1946 P C 156) "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave

> **suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth," It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect."**

and Girja Datt Singh v. Gangotri Datt Singh AIR 1955 SC 346 holding that:

> **(14) It still remains to consider whether the attestation of the signature of the deceased on the will, Ex. A-36 was in accordance with the requirements of S. 63, Indian Succession Act. S. 63 prescribes that:" (c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator. . . . . S. 68, Indian Evidence**

> **Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the will. This provision should have been complied with."**

to submit that the suspicious circumstances surrounding the execution of the Will have not been proved. He also places reliance on the decision of High Court of Orissa in Nilambar Bewa v. Fagu Prusty Pitj AIR (38) 1951 Orissa 236 to support his contention that the propounder is in law duty bound to remove all suspicious circumstances.

There is no dispute to the proposition of law that it is for the propounder of the Will to prove its execution and to remove all doubts regarding the due execution of the Will and of its being genuine, not fabricated or being the outcome of fraud, undue influence etc.

Before these principles are applied, the facts of the case may be noticed. The pleading of the appellant is that the Will Ex. PW-1/A is the outcome of fraud, undue influence, coercion etc. The relevant portion of the pleading has been reproduced above and this has remained the same even in the

amended written statement which was filed. No material facts constituting undue influence or coercion have been pleaded. Nonetheless, each of the facts which has been urged by the appellant in this appeal may be considered.

On the question of undue influence, fraud, coercion etc., one fact needs to be noticed. Every influence cannot be classed as undue influence. In Naresh Charan Das Gupta v. Paresh Charan Das Gupta and another AIR 1955 SC 363, the Hon'ble Supreme Court held:

> **"(10) It is elementary law that it is not every influence which is brought to bear on a testator that can be characterized as "undue". It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. And if the testator retains his mental capacity, and there is no element of fraud or coercion - it has often been observed that undue influence may in the last analysis be brought under one or the other of these two categories - the will cannot be attacked on the ground of undue influence. The law was thus stated by Lord Penzance in -**

'Hall v. Hall', (1868) 1 P and D 481 at page 482(C):

"but all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,- these are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led, but not driven; and his will must be the offspring of his own volition, and not the record of some one else's".

Section 61 of the Indian Succession Act (39 of 1925) enacts that,

"a will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void." Illustration (vii) to the section is very instructive, and is as follows:

"a, being in such a state of health as to be capable of exercising his own judgment and volition, B uses urgent intercession and persuasion with him to induce him to make a will of a certain purport. A, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition, makes his will in the manner recommended by B. The will is not rendered invalid by the intercession and persuasion of B."

The decision of the Privy Council in Motibai Harmusjee Kanga v. Jamsetjee Hormusjee Kanga AIR 1924 PC 28 may be noticed. It was held:

"A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing the Court will not interfere with the exercise of his volition."

The pleadings of the appellant opposing the grant of probate are, to say the least, terse and devoid of any material facts. There is no evidence to suggest that any influence, much-less undue influence, has been exercised.

On the first aspect whether the testator did or did not execute the Will at Mandi as she was present on duty in the hospital at Sundernagar, the evidence of RW-7 Dr. Arun Kumar, who was working as the Chief Medical Officer in the hospital may be considered. He has produced in evidence Ex.RW-7/A which is the Attendance Register of the employees of the hospital. He states that the presence of the testator has been marked in the Attendance Register. He says that the employees are present in the hospital in two shifts between 8 A.M. to 4 P.M. Although he testifies that the testator was present in hospital from 8 A.M. to 4 P.M. on 7.1.1993, yet he admits in cross examination that even when an employee has been marked present on record, there are chances that the employee may leave duty without seeking permission. More importantly, he admits Ex. RW-7/A does not show the presence of the testator during any particular hours. The exact part of his

testimony reads "from attendance registered produced which is Ex.RW-7/A, it cannot be said if Smt. Leela was on duty from 12 noon to 4 P.M., from 4 P.M. to 8 P.M. on 7.1.1993." He then states "however, second register brought by me shows Leela was not present on duty from 4 P.M. to 8 P.M. on that day".

In these circumstances, it cannot be said that the testator was not or could not be present in Mandi (which is at a very short distance from Sundernagar) on the day when the Will was executed. PW-3 Mahesh Chand Sharma, Advocate was the scribe of the Will. He testifies that he has been practicing in the Courts at Mandi and that he knew the testator. He then states that on 7.1.1993, the deceased testator had met him at Mandi and directed him to prepare the Will Ex.PW-1/A. He had questioned her as to whether she wanted the Will in its present form, she was firm that the disposition of the property should be in accordance with Ex.PW-1/A. He then says that he had read over and explained the Will Ex.PW-1/A to the testator in the presence of PW-2 Dyal Ram and RW-3 Baldev. The testator had admitted the correctness of the disposition and signed it in the presence of the two attesting witnesses and they had

signed in the presence of the testator. He has been corroborated in all material particulars by PW-2 Dyal Ram. He identified his signatures, the signatures of the testator and the attesting witnesses. He states that after the death of the testator, her body remained in the mortuary for 2/3 days where-after the respondent herein had performed last rights. There is nothing in his cross examination to suggest that he had either connived with the respondent herein or was in any manner instrumental in influencing or coercing the testator in executing Ex.PW-1/A. To similar effect is the testimony of PW-2 Dyal Ram who testifies that the respondent herein was looking after the testator for the last about three years. He corroborates PW-3 on all material points. Although, RW-3 Baldev does not support the case of the respondent herein, but this point will be dealt with at a later stage.

These facts clearly establish that the testator was present in Mandi on the day when the Will was executed.

On the second circumstance urged by learned counsel for the appellant that one out of the two attesting witnesses has refused to support the case

of the propounder, the evidence of RW-3 Baldev may be considered. He states that in 1993 one Will had been brought to him by the propounder namely the respondent herein and he asked him to sign as a witness. He states that the Will Ex.PW-1/A was not signed either by the testator or other attesting witnesses in his presence. He then says that the document was never read over to him. He says he did not know the testator. In cross examination, he admits that he had been a clerk with an Advocate for the last 12 years and is familiar with the Court proceedings. He also admits that he had been arrested and confined to prison for one day on an allegation that he had been trafficking in women and sending them to Iran and Iraq.

The question for determination would be as to whether when one of the attesting witnesses does not support the case of the propounder, can the document be said to have been proved when the other witness and the surrounding circumstances including the other evidence indicates that such a Will had in fact been executed? The law on this point is now well settled. In Manindra Nath Ganguli v. Durga Charan

Ganguli ILR 1949 (1) Calcutta 471, the High Court of Calcutta held:

> **"The question, therefore, arises whether the probate Court is entitled to hold in favour of the will where the attesting witnesses or some of them prove hostile. In our opinion, Courts are not powerless in those circumstances and a probate Court may pronounce in favour of the validity of the will from the circumstances of the case taken as a whole. The leading decision on this point is the decision in the case of *Wright v. Sanderson (1)*. It was the decision of the Court of appeal in England. In that case, the facts were that a testator executed a will in 1868. In 1878 the testator endorsed on the will a holograph codicil which purported to be signed by the testator. There was an attestation clause, the attesting witnesses being only two in number, namely, a nurse and a nursery-governess. These two attesting witnesses admitted their signatures on the codicil. They, however, could not say that the testator's signature was there when they signed as witnesses. They could not say that the testator signed the will. The probate Court**

upheld the will, although the evidence of the two attesting witnesses standing by itself was not sufficient to support the will. In the Court of appeal, Earl of Selborne (Lord Chancellor) was of opinion that the reasonable inference to draw was to hold that the will was duly attested. Cotton L.J. did not dissent from the evidence taken by the probate Court, although he was careful to add that if he was the trying judge he might not have come to the same conclusion as the probate Court. *Fry L. J.* affirmed the decision of the trial Court. *Fry L. J*. observed:-

The codicil propounded is ex facie perfectly regular as regards all the formalities of signature and attestation. The presumption omnia rite esse acta, therefore, applies.

This presumption in favour of the due attestation of the will, His Lordship proceeded to say, was not rebutted by the evidence of the two attesting witnesses, who deposed to say that the testator did not sign the will in their presence, but who were confused and forgetful in the witness box. The observations of *Fry L. J.* were quoted with approval by *Sir Asutosh Mookerjee J.* in the case of

Brahmadat Tewari v. Chaudan Bibi (2). **In this case the will purported to be attested by thirteen witnesses, of whom five saw the testator sign the will in their presence and the remaining eight attested the will on admission of signature by the testator. At the trial only two of the attesting witnesses were called, but they both turned hostile. In pronouncing in favour of the will, the learned Judge observed:-**

> **The principle is well settled that when the evidence of the attesting witnesses is vague, doubtful or even conflicting upon some material point, the court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with, in other words, the Court may, on consideration of the other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character or that they were willfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the will."**

To similar effect is the decision of the High Court of Calcutta in Satipada Chatterjee v. Annakali Debya AIR 1953 Calcutta 462 where the Court held that in case some or one of the attesting witnesses resile from his participation in the

signatures of the Will, the Court is not helpless but can look to the surrounding circumstances. It was held:

> **"11. The above review of the cases, in my opinion, leads to the conclusion that in cases where the evidence of the attesting witnesses is not specific but vague or doubtful or even where it is conflicting upon the same material facts, the Court may take into account the surrounding circumstances of the case and judge from the same, whether the requirements of the statute have been complied with."**

In <u>Ittoop Varghese v. Poulose and others</u> (AIR 1975 Kerala 141), the High Court of Kerala has held:

> **"5. But, as we have pointed out earlier, when the court is satisfied as in this case that the witnesses deliberately and falsely denied that they attested the will, the court is entitled to look into the other circumstances and the regularity of the will on the face of it and come to the conclusion on the question of attestation. The law on this point is stated thus by a Division Bench of the**

> **Calcutta High Court in Brahmadat Tewari v. Chaudan Bibi, AIR 1916 Cal 374…"**

To similar effect is the judgment of the Punjab and Haryana High Court in Labh Singh minor through Saudagar Singh, his father v. Major Singh and others (1981 All India Hindu Law Reporter Vol. 7 page 119) held that the Court is not powerless in circumstances and the document can be proved in accordance with Section 71 of the Indian Evidence Act.

The decision of the Hon'ble Supreme Court in Janki Narayan Bhoir v. Narayan Namdeo Kadam AIR 2003 SC 761 may also be noticed in detail. Pronouncing on the applicability of Sections 63, 68 and 71 of the Indian Evidence Act, the Court held:

> **"(8) To say Will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of section 63 of the succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the Will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or**

the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will;

(c) the most important point with which we are presently concerned in this appeal, is that the Will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgment of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

(9) It is thus clear that one of the requirements of due execution of Will is its attestation by two or more witnesses which is mandatory.

(10) Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of

proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving an evidence. It flows from this section that if there be an attesting witness alive capable of giving evidence and subject to the process of the court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of section 63 of the Succession Act with section 68 of the Evidence Act, it appear that a person propounding the Will has got to prove that the Will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of section 63 of the Succession Act. It is true that section 68 of Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in section 63. Although section 63 of the Succession Act requires that a Will has to be attested at least by two witnesses,

section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the court. In a way, section 68 gives a concession to those who what to prove and establish a Will in a court of law by examining at least one attesting witness even though Will has to be attested at least by two witnesses mandatorily under section 63 of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of section 63, viz. , attestation by two attesting witnesses in the manner contemplated therein, the examination of the attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a Will by him and the other attesting witness in order to

prove there was due execution of the Will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the Will by other witness also it falls short of attestation of Will at least by two witnesses for the simple reason that the execution of the Will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under section 63 of the Succession Act. Where one attesting witness examined to prove the Will under section 68 of the Evidence Act fails to prove the due execution of the Will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the Will by the other witness there will be deficiency in meeting the mandatory requirements of section 68 of the Evidence Act.

(11) Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of section 68, Evidence Act, to meet a situation where it is not possible to prove the

execution of the Will by calling attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the Will, its execution may be proved by other evidence. Aid of section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the Will and other attesting witnesses though are available to prove the execution of the same, for the reasons best known, have not been summoned before the court. It is clear from the language of section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of Will as required under clause (c) of section 63 of the Succession act, it cannot be said that the Will is proved as per section 68 of the Evidence act. It

cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of Will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the will. Yet, another reason as to why other available attesting witnesses should be called when the one attesting witness examined fails to prove due execution of the Will is to avert the claim of drawing adverse inference under section 114 illustration (g) of Evidence Act. Placing the best possible evidence, in the given circumstances, before the court for consideration, is one of the cardinal principles of Indian Evidence Act. Section 71 is permissive and an enabling section permitting a party to lead other evidence in certain circumstances. But section 68 is not merely an enabling section. It lays down the necessary requirements, which the court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and

> **impossibility cannot be let down without any other means of proving due execution by 'other evidence' as well. At the same time section 71 cannot be read so as to absolve a party of his obligation under section 68 read with section 63 of the Act and liberally allow him, at his Will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the court concerned and confer a premium upon his omission or lapse, to enable him to give a go bye to the mandate of law relating to proof of execution of a Will."**

Turning to the facts of the case, the Court held that one of the attesting witnesses, who had been summoned, had resiled from the stand that he had in fact attested the Will. The second witness, though alive was not summoned and in these circumstances, aid of Section 71 of the Evidence Act could not be resorted to. The Court held:

> **"(12) Turning to the facts of the case on hand, it is evident that only one attesting witness Prabhakar Sinkar, examined in the case, did not prove the execution of the will inasmuch as he did not prove the attestation of**

the Will by the other attesting witness Wagle who though available was not examined. The scribe examined in the case was not an attesting witness, which is clear from the evidence on record and as rightly conceded so by learned counsel for the respondent before us. Hence, it is unnecessary to go into the question whether the scribe in this case could or could not be an attesting witness. The evidence of Sinkar, the only attesting witness, does not satisfy the mandatory requirements of section 68 of the Evidence Act. We are not in a position to accept the contention urged on behalf of the respondent that the evidence of other witnesses, namely, that of the respondent and the scribe could be considered under section 71 of the Evidence Act. Section 71 has no application when the one attesting witness, who alone has been summoned, has failed to prove the execution of the Will and other attesting witness though available has not been examinad. When the document is not proved as mandatory required under section 68 of the Evidence Act, the provision of section 71 of the Evidence Act, which is permissive, and enabling in certain circumstances as

discussed above does not help the respondent. In Vishnu Ramkrishna and Ors. v. Nathu Vithal and Ors. AIR 1949 Bom 266, Chagla, C. J. , speaking for the Division Bench in similar circumstances has stated that although section 63 of the Succession Act requires that a Will has to be attested by two witnesses, section 68 of the Evidence Act permits the execution of the Will to be proved by only one attesting witness being called. Where the attesting witness, who is called to prove the execution, is not in a position to prove the attestation of the Will by the second witness, the evidence of the witness called falls short to the mandatory requirements of section 68. Section 71 of the Evidence act can only be requisitioned when the attesting witnesses who have been called failed to prove the execution of the Will by reason of either denying their own signatures or denying the signature of the testator or having no recollection as to the execution of the document. This section has no application when one attesting witness has failed to prove the execution of the Will and other attesting witnesses were

> **available who could prove the execution if they were called."**

In view of the authoritative pronouncements by the Hon'ble Supreme Court, precedents need not be multiplied. In case one of the attesting witnesses has "turned hostile", resort to Section 71 of the Evidence Act is permissible to prove the due execution of the Will. The Court is not totally helpless in a situation when one of the witnesses resiles from the stand that he had been an attesting witness to a Will.

As noticed, the testimony of PW-3 Mahesh Sharma, the scribe who is an Advocate and Dyal Ram PW-2 is clear, cogent and unequivocal. To recapitulate, the scribe has stated in no uncertain terms that the Will has been prepared under the directions of the testator; it was read over and explained to her, signed by her and the witnesses in his presence. To similar effect and corroborating this evidence on all material particulars is the statement of PW-2 Dyal Ram, who is the attesting witness. There is nothing in their cross examination to show that the execution of the document has been

the outcome of any fraud, coercion or misrepresentation. Coupled with the fact that the pleadings are totally insufficient, I have no doubt in my mind that the testator had in fact executed Ex.PW-1/A as the last Will and Testament. Recital in the Will also says that the propounder was looking after her. There is also evidence on record which clearly shows that the appellant did not perform her last rites despite information having been sent to him and that the body was kept in the mortuary for 2/3 days. The testimony of RW-3 is unworthy of reliance and a reading of statement shows that he has been influenced by the appellant- respondent.

Lastly, reference may be made to the pleadings of the parties. The defence taken by the appellant before the learned trial Court has been extracted in detail and falls far short of the requirement of Order 6 Rule 4 of the Code of Civil Procedure which provides:

> **"4. Particulars to be given where necessary: In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and in all other cases in**

> **which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."**

It is by now well settled that material particulars must be pleaded so that an opportunity is given to the other side to meet the case set out. In the present case, barring the use of the words fraud, undue influence, coercion etc., no material particulars have been pleaded. The bare provisions of Order 6 Rule 2 and 4 of the Code of Civil Procedure have not been complied with. The denials are evasive and the defence does not plead the facts on which it is based. However, since the parties have led evidence on the issues framed, I refrain from making any observation, except that even where the pleadings are to be construed in a liberal manner, that would not grant licence to a party to give a complete go bye to the otherwise well settled propositions of law that material particulars must be pleaded. (See *D.M.Deshpande and others v. Janardhan Kashinath Kadam (Dead) by LRs. and others (1998) 8 SCC 315*).

Admittedly, no material particulars have been pleaded in the present case except for using words in their general connotation.

The third circumstance relied upon by the learned counsel for the appellant that the Will is written on judicial paper of 1991 is of no consequence. It is a matter of common knowledge that judicial papers are lying in the office of advocates and the year or its date is insignificant. This would assume importance only in case the judicial papers pertain to a date after the death of the testator.

The last circumstance relied upon by the appellant is that in this case all the persons, namely, the beneficiary and the propounder, the scribe and the attesting witnesses are connected with the legal profession, that is to say that the scribe is an advocate, the attesting witnesses have been or are clerks (Munshis) working with the advocates. This cannot be treated as a suspicious circumstance. If the suggestion is that because of their involvement with law at one point or the other they have been instrumental in procuring the Will, this

fact has neither been pleaded, proved nor suggested to any of the witnesses in evidence.

On the last point urged by the appellant that the natural heirs have been excluded from the Will, the matter now stands concluded by judgment of the Hon'ble Supreme Court in Rabindra Nath Mukherjee and another v. Panchanan Banerjee (dead) by LRs. and others [(1995) 4 SCC 459)] holding that:

> **"(4) As to the first circumstance, we would observe that this should not raise any suspicion, because the whole idea behind execution of will is to interfere with the normal line of succession. So natural heirs would be debarred in every case of will; of course, it may be that in some cases they are fully debarred and in others only partially. As in the present case, the two executors are sons of a half-blood brother of Saroj Bala, whereas the objectors decedents of a full blood sister, the disinheritance of latter could not have been taken as a suspicious circumstance, when some of her descendants are even beneficiaries under the will."**

This decision has been followed by this Court in Gun Parkash and another v. Bhola Nath (AIR

1997 HP 27). The mere fact that the natural heirs have been excluded will not be a suspicious circumstance.

No other point has been urged.

In the facts and circumstances of the case, I do not find any merit in the appeal which is accordingly dismissed. There shall be no order as to costs.

November 13, 2007(PC). (Dev Darshan Sud),
Judge.